

Re Thien Kon Thai

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COURT OF APPEAL (KOTA KINABALU) — CIVIL APPLICATION
NO S-08-312 OF 2007

GOPAL SRI RAM, TENGKU BAHARUDIN SHAH AND SULAIMAN
DAUD JJCA

25 FEBRUARY 2008

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*Civil Procedure — Estoppel — By conduct — Whether party could be estopped
from asserting a certain right by own conduct*

C

*Civil Procedure — Judgments and orders — Binding effect — General rule that
no order may be made against a non party, exceptions to — Whether non-party
alter ego to a party already impleaded and before the court*

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*Civil Procedure — Parties — Intervention — Application by third party to
intervene in appeal — Application not made as soon as third party had notice of
claim when giving evidence at trial court — Whether third party should be
estopped from pursuing application in the appellate court on basis of conduct in
trial court — Whether manifestly unjust to allow third party's application at such
late stage*

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*Equity — Estoppel — Principles — Usefulness in substantive and procedural law
— Whether application determined by justice of case*

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The respondent ('the plaintiff') brought an action in the High Court to recover certain lands from the appellant ('the defendant'). At the first day of the trial, the defendant amended his pleadings to allege that the lands had been transferred and registered in the name of one Madam Thien. The defendant called Madam Thien as a witness and she testified that the lands were indeed registered in her name. The plaintiff's counsel, in cross-examination put to her that she was a party to fraud perpetrated by the defendant. She denied such assertion. At the end of the trial, the judge found for the plaintiff. He made several orders, including an order setting aside the transfer of the lands to Madam Thien. The judge also found the defendant guilty of fraud. The defendant filed an appeal. At the outset of the appeal's hearing, Madam Thien applied for leave to intervene in the appeal. Counsel argued that the orders made by the judge had adversely affected Madam Thien in a material aspect. Her lands, submitted counsel, were being taken away without her having been given an opportunity to provide an answer.

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- A **Held**, dismissing the application with costs:
- (1) There are two exceptions to the general rule that no order may be made against a non-party. The first are injunctions. An injunction binds every person who has notice of it, notwithstanding that they are not parties to the suit. The second is where the non-party is the alter ego of the person already impleaded and before the court. In the instant case, the trial judge found Madam Thien to be a 'tool' of the defendant's fraud, which was another way of saying she was the defendant's alter ego (see para 5); *Jones v Lipman* (1962) 1 Ch D 442 referred.
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- C (2) It was clear that Madam Thien at least had notice of the claim when she was called to give evidence in the High Court. Yet she did nothing to make herself a party and this despite the judge's remarks during the defendant's examination in chief. In the circumstances, Madam Thien should be estopped by her conduct in the High Court, from pursuing her application in the appeal before the Court of Appeal (see para 7); *Nana Ofori Atta II v Nana Abu Bonsra II* [1957] 3 All ER 559, *Meriam binti Yaacob & Ors v Shell Malaysia Trading Sdn Bhd* [1984] 2 MLJ 31 and *Tan Kiaw v Gan Chye Khoon* [1983] 2 MLJ 109 referred.
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- E (3) Estoppel is a doctrine of wide utility which pervades substantive and adjectival law. Its application depends on the justice of a particular case. If it would be unjust for a party to assert a right or conduct his or her case in a certain way or to deny the existence of certain state of affairs, the court will not allow him or her to do so. In the instant case, it would be manifestly unjust for the court to permit Madam Thien to intervene at such late stage. The application was devoid of any merits (see para 9).
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[Bahasa Malaysia summary]

- G Responden ('plaintif') telah memulakan tindakan di Mahkamah Tinggi untuk mendapat balik beberapa tanah tertentu daripada perayu ('defendan'). Pada hari pertama perbicaraan, defendan telah meminda plidingnya untuk mengatakan bahawa tanah-tanah tersebut telah dipindah milik dan didaftarkan atas nama Madam Thien. Defendan telah memanggil Madam Thien sebagai saksi dan dia telah memberikan keterangan bahawa tanah-tanah tersebut sememangnya telah didaftarkan atas namanya. Peguam plaintif, dalam pemeriksaan balas mengutarakan kepadanya bahawa dia merupakan pihak kepada fraud yang dilakukan oleh defendan. Dia telah menafikan penegasan sedemikian. Di akhir perbicaraan, hakim memutuskan bagi pihak plaintif. Beliau telah membuat beberapa perintah, termasuklah perintah untuk mengeneipkan pindah milik tanah-tanah tersebut kepada Madam Thien. Hakim juga mendapati bahawa defendan bersalah kerana fraud. Defendan telah memfailkan rayuan. Pada awal perbicaraan rayuan tersebut, Madam Thien telah memohon kebenaran untuk campur tangan
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dalam rayuan tersebut. Peguam berhujah bahawa perintah-perintah yang dibuat oleh hakim telah menjejaskan kedudukan Madam Thien dari aspek material. Tanah-tanahnya, hujah peguam, telah dirampas tanpa diberi peluang kepadanya untuk memberikan jawapan.

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Diputuskan, menolak permohonan dengan kos:

- (1) Terdapat dua pengecualian kepada rukun am bahawa tiada perintah boleh dibuat terhadap yang bukan merupakan pihak. Pertamanya adalah injunksi-injunksi. Suatu injunksi mengikat setiap orang yang mendapat notisnya, meskipun mereka bukan pihak kepada guaman itu. Kedua adalah di mana yang bukan pihak adalah *alter ego* seseorang yang telahpun merayu dan di hadapan mahkamah. Dalam kes ini, hakim perbicaraan mendapati bahawa Madam Thien adalah 'tool' fraud defendan, yang mana dalam perkataan lain mengatakan dia adalah *alter ego* defendan (lihat perenggan 5); *Jones v Lipman* (1962) 1 Ch D 442 dirujuk.
- (2) Adalah jelas bahawa Madam Thien sekurang-kurangnya mendapat notis tuntutan tersebut apabila dia dipanggil untuk memberikan keterangan di Mahkamah Tinggi. Namun dia tidak berbuat apa-apa untuk membuat dirinya satu pihak dan ini adalah meskipun hakim telah membuat kenyataan semasa pemeriksaan utama defendan. Dalam keadaan sedemikian, Madam Thien patut diestopkan perlakuannya di Mahkamah Tinggi, dari meneruskan permohonannya dalam rayuan ke Mahkamah Rayuan (lihat perenggan 7); *Nana Ofori Atta II v Nana Abu Bonsra II* [1957] 3 All ER 559, *Meriam binti Yaacob & Ors v Shell Malaysia Trading Sdn Bhd* [1984] 2 MLJ 31 dan *Tan Kiaw v Gan Chye Khoon* [1983] 2 MLJ 109 dirujuk.
- (3) Estoppel adalah doktrin yang digunakan secara meluas yang menyebarkan undang-undang substantif dan adjektif. Penggunaannya bergantung kepada keadilan dalam kes tertentu. Sekiranya ia adalah tidak adil untuk satu pihak menegaskan hak atau perlakuannya atau kesnya dalam cara tertentu atau untuk menafikan kewujudan keadaan urusan tertentu, mahkamah tidak membenarkannya berbuat sedemikian. Dalam kes ini, ia amat tidak adil untuk mahkamah membenarkan Madam Thein campur tangan di peringkat selewat ini. Permohonan tersebut tidak mempunyai apa-apa merit (lihat perenggan 9).]

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Notes

For a case on binding effect, judgments and orders, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 4055.

- A For a case on principles of equity, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) para 2706.
For cases on estoppel by conduct, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2601–2605.
For cases on intervention, parties, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5003–5041.
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Cases referred to

- Jones v Lipman* (1962) 1Ch D 442 (refd)
Meriam binti Yaacob & Ors v Shell Malaysia Trading Sdn Bhd [1984] 2 MLJ 31 (refd)
Nana Ofori Atta II v Nana Abu Bonsra II [1957] 3 All ER 559 (refd)
Tan Kiau v Gan Chye Khoon [1983] 2 MLJ 109 (refd)
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- D **Appeal from:** Civil Suit No K22–08 of 2004 (High Court, Kota Kinabalu)
Roland Cheng (Roland Cheng & Co) for the applicant.
Peter Vung Yin Sing (Muhammad Shafee with him) (Junius Yung & Co) for the appellant.
- E *Cyrus Das (Colin Lau and Baldev Singh with him) (Baldev Gan & Associates) for the respondent.*

Gopal Sri Ram JCA (delivering judgment of the court):

- F [1] This is the judgment of the court.
- [2] This is an application by Madam Thien Kon Thai ('Mdm Thien') who seeks leave to intervene by notice of motion dated 10 October 2007 in the appeal before us namely, Civil Appeal No S-02-447 of 2007.
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- [3] The brief facts which form the background to this application may be stated as follows. An action was brought in the court below by the instant respondent to recover certain lands from the appellant. At the outset of the trial, counsel for the respondent (the plaintiff in the court below) very properly applied to have Mdm Thien joined as a defendant. However, after taking into account the learned trial judge's observations, counsel did not pursue his application. The trial then proceeded. The plaintiff closed his case. The defendant then opened his case and called a number of witnesses. Mdm Thien was one of them. She was called as his eighth witness. In the course of her cross-examination Mr Baldev Singh quite correctly put to her that she was a party to the fraud that had been allegedly perpetrated by the defendant. Mdm Thien of course denied this. The matter rested there. At the conclusion of the trial the learned judge made certain damning findings against the
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defendant. These are now under challenge in the appeal and for that reason we will say no more about them. The learned judge then went on to make certain orders in the plaintiff's favour including an order setting aside the transfer of the lands to Mdm Thien. We must pause here to mention the facts which are of immediate relevance. Firstly, that the lands in question had been transferred to Mdm Thien (in circumstances that were attacked in the court below). Secondly, that the defendant had on the first day of the trial also moved an amendment to his pleadings to allege that the lands had by then been transferred and registered in Mdm Thien's name.

[4] Mr Roland Cheng of counsel for Mdm Thien has strenuously argued that the far reaching orders made by the learned judge had adversely affected his client in a material aspect without she having been given an opportunity of being heard. She was the registered proprietor of the lands at the material time. That is the date when the orders were made. Her land was being taken away without her having been given an opportunity to provide an answer. All these, counsel submits, is a flagrant breach of the rules of natural justice.

[5] We accept that it is a general rule that no order may be made against a non party. However there are two exceptions to this rule. The first are injunctions. An injunction is not only binding upon the person to whom it is directed. It also binds his agents or servants although they are not parties to the suit. It binds every person who has notice of it. The second exception is where the party complaining of being excluded is really the alter ego of the person already impleaded and before the court. *Jones v Lipman* (1962) 1 Ch D 442 provides an excellent example. There a defendant who had agreed to sell his land to the plaintiff transferred it to a company of which he and a clerk of his solicitors were sole shareholders and directors. Russell J (later Lord Russell of Killowen) had no hesitation in decreeing specific performance against the limited company. He described the company as a sham or a cloak.

[6] Now Mr Roland Cheng quite correctly conceded that for the purpose of his application the findings by the learned judge must be accepted as binding upon his client. Now, if you look at the judgment of the learned judge you will be left with no doubt that he found Mdm Thien to be, to employ his words, 'a tool' of the defendant's fraud. To our minds this is merely another way of describing Mdm Thien as the defendant's alter ego. So if one were to speak of prejudice when viewing the facts from this perspective there is really none. For Mdm Thien is not adversely affected in any material aspect as she is merely the defendant's privy.

[7] There is another and more substantial reason why discretion should be exercised against Mdm Thien. It is this. On the material before us it is clear that Mdm Thien at least had notice of the claim when she was called to give

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A evidence and certainly not later when it was put to her that she was a party to the fraud. Yet she did nothing to make herself a party and this despite the learned judge's remarks during the defendant's examination-in-chief. In the circumstances we are of the view that Mdm Thien is estopped by her conduct in the court below from pursuing her application before us this afternoon.

B In this respect we need to go no further then to quote from the judgment of Lord Denning MR in the Privy Council case of *Nana Ofori Atta II v Nana Abu Bonsra II* [1957] 3 All ER 559, at p 561:

C English Law recognises that the conduct of a person may be such that he is estopped from litigating the issue all over again. This conduct sometimes consists of active participation in the previous proceedings as, for instance, when a tenant is sued for trespassing on his neighbour's land and he defends it on the strength of the landlord's title and does so by the direction and authority of the landlord. If the tenant loses the action, the landlord would not be allowed to litigate the title all over again by bringing an action in his own name. On other occasions the conduct consists of taking an actual benefit from the judgment in the previous proceedings, such as happened in *Re Lart, Wilkinson v Blades* [1896] 2 Ch 788. Those instances do not, however, cover this case which is not one of active participation in the previous proceedings or actual benefit from them, but of standing by and watching them fought out or at most giving evidence in support of one side or the other.

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[8] In this context we would also refer to the decisions of the former Federal Court in *Meriam binti Yaacob & Ors v Shell Malaysia Trading Sdn Bhd* [1984] 2 MLJ 31 and *Tan Kiau v Gan Chye Khoon* [1983] 2 MLJ 109 which are to the same effect.

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[9] In our judgment, based on the authorities already cited, Mdm Thien is certainly estopped by her conduct in all the circumstances of the case. It has been said often enough that estoppel is a doctrine of wide utility which pervades substantive and adjectival law. Its application depends on the justice of a particular case. If it would be unjust for a party to assert a right or conduct his or her case in a certain way or to deny the existence of certain state of affairs, the court will not allow him or her to do so. In the circumstances of the present case it would be manifestly unjust for the court to permit Mdm Thien to intervene at this late stage. It would mean that the plaintiff would be hard put to do battle on a completely new terrain. It is quite clear that what Mdm Thien seeks to do by intervening in this appeal is to demonstrate that the transfer of the lands to her were good for reasons wholly different from that in the court below. That much is clear from the draft memorandum of appeal made available to us during the course of

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hearing this appeal. Viewed from any point, this application is devoid of any merits. It is dismissed. The respondent shall have the costs of and occasioned by this application in any event.

Application dismissed with costs.

Reported by Andrew Christopher Simon

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